

SUPREME COURT OF WASHINGTON

DAVID T. MCDONALD, RONALD TARO
SUYEMATSU, et al.

Petitioner-Electors,

v.

SECRETARY OF STATE SAM REED, et
al.,

Respondents.

NO. 76321-6

DECLARATION OF BETH A.
COLGAN IN SUPPORT OF PETITION
FOR WRIT OF MANDAMUS

Beth A. Colgan declares as follows:

1. I am one of the attorneys for plaintiffs, am competent to make this declaration, and do so upon personal knowledge as indicated.
2. Attached hereto as Exhibit A is a true and correct copy of an email sent from John White, counsel for the Washington State Republican Party, dated December 5, 2004.

DECLARATION OF BETH A. COLGAN IN
SUPPORT OF PETITION FOR WRIT OF
MANDAMUS - 1

[15934-0006-000000/SL043410.315]

Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
Phone: (206) 359-8000
Fax: (206) 359-9000

1 3. Attached hereto as Exhibit B is a true and correct copy of the Manual
2
3 Recount Procedures Most Frequently Asked Questions produced by the Secretary of State.

4 4. Attached hereto as Exhibit C is a true and correct copy of an article entitled,
5
6 “Washington orders third count in governor race,” published in the Seattle Post-Intelligencer
7
8 on December 6, 2004 and available at
9
10 <http://seattlepi.nwsourc.com/printer/ap.asp?category=642&slug=WA%20Governor%20Re>
11
12 [count.](http://seattlepi.nwsourc.com/printer/ap.asp?category=642&slug=WA%20Governor%20Re)
13

14 5. In the Declaration of Ryan J. McBrayer submitted on Exhibit F was
15
16 mistakenly identified as draft guidelines for the hand recount issued by the Secretary of
17
18 State. Exhibit F is actually a copy of the final guidelines issued by the Secretary of State for
19
20 the machine recount.
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22 6. Attached hereto as Exhibit D is a true and correct copy of the Memorandum
23
24 Opinion and Order entered November 16, 2004 in *Washington State Democratic Central*
25
26 *Committee, et al. v. King County Records, Elections and Licensing Division, et al.*, No. 04-
27
28 2-36048-0SEA (King County Superior Court).
29

30 7. Attached hereto as Exhibit E is a true and correct copy of a Seattle Post-
31
32 Intelligencer article entitled, “In Their Own Words,” published December 6, 2004.
33

34 8. Attached hereto as Exhibit F is a true and correct copy of Washington State
35
36 Republican Party’s Motion for Temporary Restraining Order and Memorandum in Support
37
38 Thereof.
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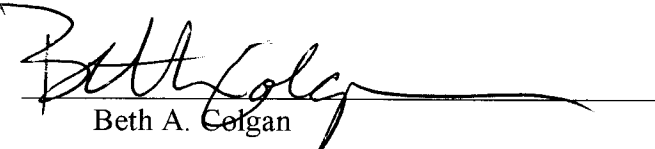
DECLARATION OF BETH A. COLGAN IN
SUPPORT OF PETITION FOR WRIT OF
MANDAMUS - 2

[15934-0006-000000/SL043410.315]

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1 I declare subject to penalty of perjury under the laws of the State of Washington that
2 the foregoing is true and correct.
3

4 SIGNED and DATED at Seattle, Washington, this 7th day of December, 2004 by
5 BETH A. COLGAN.
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11 Beth A. Colgan
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DECLARATION OF BETH A. COLGAN IN
SUPPORT OF PETITION FOR WRIT OF
MANDAMUS - 3

[15934-0006-000000/SL043410.315]

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From: John White

Sent: Sunday, December 05, 2004 3:12 PM

To: 'Zona Lenhart'; 'Al Brotche'; 'bvarney@co.grant.wa.us'; 'Bob Terwilliger'; 'Bobbie Gagner'; 'Carla Heckford'; 'Cathleen McKeown'; 'Clydene Bolinger'; 'Coralee "Corky" Mattingly'; 'David Bowen'; 'Diana Housden'; 'Diane Tischer'; 'Donna Deal'; 'Donna Eldridge'; 'Elaine Johnston'; 'Eunice Coker'; 'Evelyn Arnold'; 'Gary Zandell'; 'Greg Kimsey'; 'J. Michael Garvison'; 'Karen Flynn'; 'Karen Martin'; 'Kim Wyman'; 'Kristina Swanson'; 'Nancy McBroom'; 'Norma Brummett'; 'Pat Gardner'; 'Pat McCarthy'; 'Peggy Robbins'; 'Sharon Richter'; 'Shelly Johnston'; 'Shirley Forslof'; 'Si Stephens'; 'Suzanne Sinclair'; 'Thad Duvall'; 'Tim Gray'; 'Vern Spatz'; 'Vicky Dalton'; 'dean.logan@metrokc.gov'; 'MMcLaughlin@spokanecounty.org'; 'Barbara Sandahl'; 'dadelste@co.whatcom.wa.us'; 'dvaughan@co.lincoln.wa.us'; 'tolson@pendoreille.org'; 'Beverly Lamm'; 'Bill Huennekens'; 'PBrandt@spokanecounty.org'; 'Carolyn Diepenbrock'; 'Dan Gillespie'; 'David O'Brien'; 'Dawn Weaver'; 'debrah@co.whitman.wa.us'; 'Delores Gilmore'; 'Diana Killian'; 'Diana Soules'; 'Dianna Galvan'; 'Erika Kubischta'; 'fanderson@co.grant.wa.us'; 'Heidi Hunt'; 'Julie Moore'; 'Karen Cartmel'; 'Katrina Manning'; 'Libby Nieland'; 'LoAnn Gulick'; 'Lori Augino'; 'Mariann Zumbuhl'; 'Mila Jury'; 'Nissa Shaw'; 'Pat Pennington'; 'Pat Sykora'; 'Patty Rosand'; 'Peggy Laughery'; 'Pete Griffin'; 'Ron Pursley'; 'Steve Homan'; 'Sue Higginbotham'; 'Susie Christopher'; 'Tim Likness'

Cc: 'Peter Schalestock'; 'Korrell, Harry'; 'Diane Tebelius'; 'Chris Vance'

Subject: Washington State Republican Party - recount procedures and information

Dear County Auditors and Election Directors:

I am counsel to the Washington State Republican Party. With the beginning of a statewide hand recount days away, I am writing because the WSRP wants to help make sure that best practices are implemented on a uniform, statewide basis for the handling of ballots so that no voter is disenfranchised by the physical handling of their ballots, and that there is a complete and accurate count of all legal ballots.

We appreciate the magnitude of the effort about to be undertaken, and that many of you may already have policies in place that address some or all of these concerns.

The key contact persons for the WSRP and the Rossi campaign on these matters are Peter Schalestock (206-669-8811) and Travis Sines (425-241-4380). If you have any questions about this letter, please contact them.

Our concerns about ballot degradation are greater with punch card

ballots because of deterioration from repeated handling. However, the WSRP believes that a few simple steps can help avoid inadvertent disqualification of votes during the handling process for all types of ballots.

Ballot handling

All persons handling ballots as part of the manual recount should wear plastic gloves. This will reduce the risk of smudges from skin oils, dirt or other materials that may become lodged under a worker's fingernails. Plastic gloves will also reduce the risk of damage to punch card ballots from long, sharp or broken fingernails.

Foreign and sharp objects should be kept away from the counting tables to prevent damage to punch card ballots. Each time ballots are run through machines or handled the risk of chads coming loose increases, as was seen during the 2000 Presidential recount. We believe the elections office should take all reasonable steps to reduce the risk of further damage or deterioration of ballots. Similarly, pens, markers, or other writing utensils should be kept away from the counting tables. They have the ability to pierce punch cards or cause stray, and possibly disqualifying marks on optical scan ballots.

Observers

The ballot recount process should both be and appear fair. The recount process should be transparent, with error on the side of making the physical inspection of ballots observable, and verifiable to observers from both parties, and the press. Representatives of the Republican Party have contacted or will be contacting you to arrange for observers to be present throughout the recount. The ability to observe the manual inspection of ballots should be meaningful. There should be adequate facilities to accommodate both election workers and observers. Distant, designated observer areas that may prevent observers from seeing what is actually happening at each counting station defeat the statutory right to observe the process. We believe that both the election workers and party observers are integral in the statutory scheme for counting ballots, and giving Washingtonians confidence in the result.

Ability to address concerns and problems

If there are difficulties at the location at which you are conducting the manual recount, please do not hesitate to contact Mr. Schalestock or Mr. Sines. Our observers and entire recount team share your commitment to a full and accurate count. We look forward to a cooperative relationship in your efforts to make sure that all lawful ballots are counted.

John J. White, Jr.
white@lclaw.com
(425) 822-9281 ext. 321

The contents of this message and any attachments may contain confidential information and be protected by the attorney-client privilege, work product doctrine or other applicable protection. If you are not the intended recipient or have received this message in error, please notify the sender and promptly delete the message. Thank you for your assistance.

Exhibit B

Exhibit B

**Manual Recount Procedures
Most Frequently Asked Questions
Secretary of State**

Q: What is a manual recount?

A manual count is the process of hand counting ballots.

Most counties in Washington have conducted manual recounts in local elections, but this is the first statewide manual recount.

Manual recounts are typically conducted by two or three member counting boards, but the actual method varies from county to county.

King County, for example, is proposing 80 counting boards consisting of three members each. Each board would have 1 Republican, 1 Democrat, and 1 King County staff member. King County has requested that each party nominate 80 party members for these assignments. In addition, parties are entitled to have official observers.

Ballots are typically sorted into precincts. Each counting board then proceeds to place each precinct's ballots into separate stacks for each candidate and counts each stack to determine the results for that precinct.

The totals from each counting board are combined to determine the final results.

Q: What does "canvassing" ballots mean and how does it differ from "counting" ballots?

Counting ballots is the process of tabulating ballots either by machine or by hand.

Canvassing is a broader term that includes the process of examining ballots to determine matters such as the voter's intent.

The method of voting varies from county to county. Votes are registered by filling in ovals, connecting arrows, or punching out chads.

More than 99% of all voters properly mark their ballot such that no analysis is needed. The tabulating machine will properly count these votes.

Fewer than 1% of voters do not follow instructions and make other marks on the ballot that the machine is not able to tabulate. Examples of these situations in a county where the voter fills in ovals are as follows.

A voter may fill in the oval for Chris Gregoire and also fill in the oval for a write-in. In the write-in space, the voter may then write the name Chris Gregoire. The machine will record that as an "overvote" and not record a vote for Chris Gregoire. Upon hand inspection, the voter's intent will be discovered, and a ballot will be duplicated so the tabulating machine can read that vote for Chris Gregoire.

Some voters may underscore, circle, or check candidates on the ballot instead of filling in the oval. The tabulating machine will not record a vote in those instances. Upon hand inspection, if the voter's marks evidence a clear and discernible pattern, votes will be reported consistent with that voter intent.

Some voters may properly fill in the oval, but then inadvertently draw a line that passes through another oval. The machine may record that as an "overvote" but on hand inspection examination voter intent may be determined.

Q: What rules do counties use in determining voter intent on a ballot where the voter has not followed instructions?

After the U.S. Supreme Court's decision in Bush v. Gore, Washington promulgated statewide regulations to guide county decisions on "what constitutes a vote." These include standards relating to the infamous "hanging chads" in punch card counties as well as various markings on ballots in optical scan counties.

Typically, election workers make determinations in straightforward situations regarding voter intent in consultation with trained supervisors. Questions are referred to the county's three member canvassing board for decision.

Each county's canvassing board consists of the County Auditor (in King County, the Manager of Records, Elections, and Licensing), Prosecuting Attorney and chair of the County Council or Commission, or their designees. Canvassing Board decisions are made in an open public meeting with observers present and these decisions are the final say on what constitutes a vote.

Q: Will the ballots be "canvassed" in a manual recount?

At the point of a manual recount, the vast majority of ballots have already been canvassed in that the ballot has been individually examined and a determination made regarding the voter's intent and other matters.

Most canvassing decisions are made in the original count. Additional canvassing decisions are made in the machine recount when some ballots not previously hand inspected are examined for the first time.

At the point of a manual recount, all ballots should have been hand inspected and canvassing board decisions have been made.

With over 2.8 million individual ballots involved, however, the possibility that election workers hand counting ballots will find markings or situations on ballots that were not previously canvassed is possible.

In these instances, the same process and standards used in the original count and machine recount will be used to determine issues such as voter intent, and the ballot will be processed according to that determination.

Q: In a manual recount, will the counties revisit prior canvassing decisions?

As a general matter, counties will not revisit prior canvassing decisions in the manual recount.

The statutes require a “recount,” not a “recanvass” of the election.

Canvassing boards have made literally thousands of decisions already regarding signature verification and voter intent on ballots. These decisions were made in the original count and in the machine recount.

These prior decisions of the canvassing boards will be the basis for the manual recount.

Two exceptions exist to this general rule.

First, if a ballot is discovered in the hand recount that presents issues such as voter intent not previously resolved, that ballot will be “canvassed” to determine voter intent under the same standards and process used in the original count and machine recount.

Second, any canvassing board at any time in the original count, machine recount, or manual recount may, upon finding that a discrepancy or inconsistency exists, direct a recanvass of any necessary portion of the ballots.

Q: Will the rules or standards change in a manual recount?

No. Other than counting the ballots by hand, the standards and rules for canvassing and counting ballots will remain the same throughout the entire election process.

A fundamental bedrock principle of election administration is that the rules should not be changed in the middle of an election.

If irregularities, discrepancies, or errors are discovered, these must be resolved by the existing rules and standards in place for the election that are being uniformly observed statewide.

Exhibit C

Exhibit C

SEATTLE POST-INTELLIGENCER

Monday, December 6, 2004 · Last updated 5:46 p.m. PT

Washington orders third count in governor race

By DAVID AMMONS
AP POLITICAL WRITER

OLYMPIA, Wash. -- Washington state on Monday ordered a third vote tally - this time an expensive and time-consuming hand count - to solve a political mystery: Who will be the state's next governor?

The state Supreme Court apparently will jump into the fray later this week, potentially expanding the number of ballots to be counted.

The first count ended with Republican Dino Rossi 261 votes ahead of Democrat Christine Gregoire out of 2.9 million ballots cast five weeks ago. An automatic machine recount certified a week ago again put Rossi ahead, this time by 42 votes.

Gregoire, 57, the state's three-term attorney general, is best known for her successful battle with the tobacco industry. Rossi, 45, is a self-made millionaire and a former state Senate budget chairman.

On Monday, Secretary of State Sam Reed ordered an unprecedented statewide hand recount, to begin on Wednesday in most counties.

The Democrats, who are paying for the hand recount, are using a state law that allows it in rare cases when races are this close. The manual recount has never before been ordered in a Washington governor's race.

The bill could exceed \$1 million, including legal fees and a ballot-handling cost of at least 25 cents per vote.

Reed's simple announcement to the 39 counties directs election departments to get started on Wednesday or Thursday. The count will take until Christmas week in some areas, especially in King County, where a third of the state's voters live and where more than 2,600 precincts must be recounted.

"Our assumption is that their job is to simply recount the ballots that were previously counted in the machine recount," Reed said in an interview. "However, in our rules we point out that the canvassing boards have the prerogative to take up and re-examine any problem ballots that have come to their attention ... and we are giving them the word that the Washington state Supreme Court will take up the Democrats' case on (Wednesday or) Thursday.

"But at this point, we are not authorizing them to go back and start all over again."

Besides demanding a new recount, Democrats are asking the high court to order election departments to reconsider several thousand previously rejected ballots and potential trouble spots. These include questioned "provisional" and absentee ballots, including hundreds where the voter's signature was missing or didn't match the one on the voter registration card.

The party also said potential problems have been identified in Skagit, Grant, Franklin, Snohomish, Kittitas, Pierce, Adams, Benton, King and Pend Oreille counties. Some counties discovered uncounted ballots and not all counties are counting ballots precisely the same, the party said.

Democrats also object to the practice in many counties of including an identified Democrat and a Republican on each three-member counting panel.

"Government mistakes have kept some ballots from being counted, several thousand is what we've heard, and when the race is too close to call, every vote counts," said Gregoire spokesman Morton Brilliant.

"It looks like we're on track to finally know who won the governor's race in the next few weeks," he said.

Added Gregoire, "I love Dino's line 'If you count and count and you count again, what do you get?' You get yourself a governor, Dino, because it's over at that point."

Rossi's actual answer to his rhetorical question is that Gregoire would have an illegitimate governorship if she wins this way.

"They will do whatever is necessary," he said in an interview.

Republicans are more upset with the Supreme Court case than with the notion of yet another vote count, said Mary Lane, a Rossi spokeswoman.

"Our problem is not a by-the-rules statewide recount," she said in an interview. "That's fine. That's the law. What we strenuously object to is this lawsuit Christine Gregoire has put forward and her attempt to change the rules midway through a recount.

"Christine Gregoire isn't interested in a fair recount. She wants this to be as inaccurate and as corruptible as possible. She didn't get the results she wanted, so now she wants to change the rules. Anyone who is concerned about the integrity of our election system should be very worried."

State GOP Chairman Chris Vance agreed: "Democrats keep trying to change the rules so they can overturn the will of Washington voters."

But state Democratic Chairman Paul Berendt said Democrats' only interest is in counting every legitimate vote.

"It may take a little while longer, but it's worth three more weeks to count all the votes and provide four years of legitimacy for the next governor," he said.

Republicans: <http://www.wstrp.org/>

Democrats: <http://www.wa-democrats.org>

Returns: <http://www.vote.wa.gov>

Exhibit D

Exhibit D

FILED
KING COUNTY WASHINGTON

NOV 16 2004

SUPERIOR COURT CLERK
BY DANIELLE HAGERMAN
DEPUTY

ORIGINAL

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

WASHINGTON STATE REPUBLIC PARTY,)

Applicant-Intervenor.)

v.)

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE, et al.,)

Plaintiffs,)

v.)

KING COUNTY RECORDS, ELECTIONS
AND LICENSING SERVICES DIVISION,
et al.,)

Defendants.)

Case No. 04-2-36048-0 SEA

MEMORANDUM OPINION
AND ORDER

(clerk's action required)

"It is the policy of the State of Washington to encourage every eligible person to register to vote and to participate fully in all elections, and to protect the integrity of the electoral process by providing equal access to the process while guarding against discrimination and fraud. The election registration laws and the voting laws of the State of Washington must be administered without discrimination based upon race, creed, color, national origin, sex or political affiliation." RCW 29A.04.205.

1 We have arrived at the moment which all reasonable Washingtonians have dreaded for
2 four years: the moment when the Court is asked to micro-manage an election. Everyone would
3 agree that Court is not the proper place to decide an election, yet this has not stopped both
4 Republicans and Democrats have rushed to Court at the last minute, seeking emergency
5 restraining orders and injunctions, claiming all sorts of improprieties by the other side, with King
6 County Records, Elections and Licensing Services Division and the Court "whipsawed" in the
7 middle.

8 In situations like this, the Court needs to fall ball back on the fundamental principals of
9 public disclosure, openness in government, the legal requirements for temporary restraining
10 orders and the Constitution. In other words, the Court needs to follow the law.

11 12 13 THE PUBLIC DISCLOSURE ACT CLAIM

14 On November 12, 2004, this Court ordered King County to make public a list of 929
15 provisional ballot voters with questioned signatures. The Court was guided by two concepts
16 central to the democratic process: the right of every lawfully registered voter to have his or her
17 vote counted, and the public's right to an open and transparent electoral process, including open
18 access to public voting records. These rights belong to all citizens, regardless of political party¹.

19
20
21 ¹ These rights are crystal clear in both case law and statute. In Washington v. Sanders, 376 U.S. 1, 17 (1964), the
22 United States Supreme Court held:

23 "No right is more precious in a free country than that of having a voice in the election
24 of those who make the laws under which, as a good citizen, we must live. Other rights,
25 even the most basic, are illusory if the right to vote is undermined."

26 The Washington Public Disclosure Act states "It is hereby declared by the sovereign people of the state of
Washington... (t)hat full access to information concerning the conduct of government on every level must be assured
as a fundamental and necessary precondition to the sound governance of a free society". RCW 42.17.010. The
Washington Public Disclosure Act is a strongly worded mandate for broad disclosure of public records, Hearsel
Corp. v. Hoppe, 90 Wn.2d 123, 127 (1978), and the public record act's provisions are to be liberally construed to

1 In this case, King County admitted that the provisional ballot voter list would qualify as a
2 public record if it existed in paper form, that other counties were releasing similar lists as public
3 records and that both political parties in those counties were contacting provisional ballot voters
4 with those lists. King County admitted that lists of all other registered voters, including
5 absentees, were a matter of public record, yet argued that the federal Help America Vote Act
6 (HAVA) somehow prevented disclosure. When read in context and together with other state and
7 federal election statutes, however, it is clear that HAVA only precludes disclosure of for whom
8 (or for what) the provisional voter voted, not whether that voter's ballot had been counted or the
9 identity of that provisional voter. The Democratic Party, as a member of the public, has a right to
10 the public election records in King County, just as the Republican Party and many others have a
11 right to public election records in King County and elsewhere.

12 King County produced the list to plaintiff and the public shortly after it was ordered.
13 Amid significant print, television, Internet and radio media coverage, plaintiff represented to the
14 Court that its volunteers would try to contact every provisional voter on the list. In other words,
15 public disclosure of the public documents and a free press likely provided more notice than
16 letters mailed by King County would have.

17 PLAINTIFF'S OTHER CLAIMS

18 Although plaintiff did not request further relief in its motion, the underlying Complaint
19 filed in this lawsuit goes much, much further, and the Court is obligated to either resolve the
20 entire lawsuit in some manner or set it for trial. The Complaint asserts that King County not only
21 violated the Washington Public Disclosure Act, but violated federal and state constitutions and
22 state election law. Plaintiff's argument, taken to its logical end, would require election officials
23 to treat provisional and absentee ballots the same, and would have ramifications far beyond King
24

25 promote full access to public records, with it's exceptions to be narrowly interpreted. Confederated Tribes v. Johnson, 135 Wn.2d 734, 746 (1998).

1 County and the Washington Gubernatorial race. The Court cannot and will not grant further
2 relief to plaintiff at this time for several reasons.

3 First, although King County misread HAVA, there is every indication that the King
4 County Records, Election and Licensing Services Division acted professionally and intended to
5 act in the public's best interest under immense pressure and under intense public scrutiny.
6 Armies of lawyers and poll watchers examine King County's every move, threatening litigation
7 and more. Under the circumstances, King County's prudence is understandable. Second, as
8 pointed out above, the public disclosure of and publicity surrounding the 929 provisional ballots
9 exceeded any notice that County mailed letters would have provided. Any failure by King
10 County to affirmatively contact the provisional ballot voters has, under the limited facts
11 presented to date, likely been cured. Third, to the extent that there is any Equal Protection or
12 Due Process violation at all, the dispute is premature and not based on any actual evidence. This
13 Court cannot rule on premature or hypothetical disputes, nor can it give advisory opinions. See,
14 Diversified Industries Development v. Ripley, 82 Wn.2d 811, 815 (1973); Washington Coalition
15 for the Homeless v. DSHS, 133 Wn.2d 894, 947 (1997)(courts may only resolve justiciable
16 controversies, which require an actual or existing dispute, as distinguished from a possible,
17 dormant, hypothetical, speculative or moot disagreement, and which allow the judicial
18 determination to be final and conclusive). At oral argument, the attorneys argued that there are
19 no facts in dispute, yet many facts are unknown and may be unknowable. Plaintiff does not
20 know, and may never know, how many of the provisional voters voted for its candidates. The
21 Court does not know whether any voter was actually denied the right to have his or her vote
22 counted, how many of the 929 provisional ballots in question or how many of the 36,000 other
23 provisional ballots were eventually counted or the extent to which lack of computer access
24 affected these ballots. The Court does not know what changes election officials, the executive
25 branch or the legislative branch will make relating to possible uniformity in handling provisional

1 ballots across the state. Any decision by this Court on plaintiff's Constitutional claims would be
2 based, at this point, on speculation and facts not part of the record. Lastly, there is a very real
3 possibility that plaintiffs lack legal standing to raise the Constitutional issues asserted in their
4 Complaint and that several necessary parties, including the Washington State Secretary of State
5 and the State Attorney General, have not been named and/or served. See, RCW 7.24.110.
6 Although plaintiff, as a member of the public, clearly has standing to raise the Public Disclosure
7 Act claims, such is not the case with the rest of its claims. In a lawsuit like this, with its potential
8 ramifications, it is essential that the proper parties be before the Court, that the record be
9 complete and that the arguments be fully developed.

10 INTERVENOR'S CLAIMS

11 The Court granted applicant Washington State Republican Party's motion to intervene
12 orally in open court as a matter of fundamental fairness, and so that their position could be heard
13 by all. On the eve of certification, the Republican Party moves for a temporary restraining order,
14 prohibiting King County from counting any of the provisional ballots brought in by any 3rd party.
15 Rather, the Republican Party wants each of the provisional voters to come in to the elections
16 office in person. Under Washington law, one seeking a temporary restraining order must show
17 (1) that he or she has a clear legal or equitable right; (2) that he has a well-grounded fear of
18 immediate invasion of that right, and (3) that the acts complained of are either resulting in or will
19 result in actual and substantial injury to him. Tyler Pipe Industries v. Washington State
20 Department of Revenue, 96 Wn.2d 785 (792 (1982)). Here, Applicant-Intervenor cannot carry its
21 burden on factors (1) and (3). There is no evidence before this Court and it is speculative as to
22 what injury will occur should the Court not enter this TRO. Moreover, both parties have hinted
23 that both Democrats and Republicans across the state may be the 3rd parties delivering
24 provisional ballots to election offices. Most importantly, however, Applicant-Intervenor has not
25 demonstrated that King County is acting unlawfully. Although it argues that there are alternative

1 ways to process the election, there is no showing that King County is violating the law, and
2 therefore Applicant-Intervenor has not shown a clear legal right to the relief. As it is the moving
3 party, it is Applicant-Intervenor's burden to demonstrate this, and they have not done so

4 A word needs to be said about possible voter fraud. The Court does not place a huge
5 amount of weight on the allegations that both parties are delivering provisional ballots to election
6 offices. What is clear is that there is no actual evidence of voter fraud presented to this Court,
7 and that the Republican party's suggested remedy (that the voter actually come down to the
8 office rather than having a 3rd party deliver it) does not protect against voter fraud since King
9 County does not certify or verify the identities of even those people who show up in person.

10 Indeed, the best protection against voter fraud is public disclosure, to the press and all citizens, of
11 a list of all provisional ballot voters. That is exactly what the Court did on November 12, 2004.

12 If it is shown later that one or both parties were actually engaged in voter fraud, we will find out,
13 and the consequences flowing from any such misconduct will be serious and long-lasting indeed.

14 But as in the Court's ruling denying the Democrats' claims, the Court cannot speculate and needs
15 to rely on evidence. None has been presented here.

16 The Court will deny the requested relief in all respects except one: to preserve the status
17 quo as much as possible, the Court will require King County to keep a list of the number of
18 provisional ballots (to the extent it knows) that were delivered by 3rd parties. However, the
19 ballots themselves may be processed and the election should proceed.

20 CONCLUSION

21
22 The Court granted plaintiff's TRO and Writ of Mandamus in part and ordered disclosure
23 of the requested list of 929 provisional ballot voters. King County immediately complied. The
24 Court's November 12, 2004 order stands. The rest of the Washington State Democratic Central
25 Committee's requested relief is denied and dismissed without prejudice.

1 The Washington State Republican Party's motion to intervene is granted, but its motion
2 for TRO is granted in part and denied in part. King County will be required to maintain a list of
3 the number provisional ballots delivered to it by 3rd parties for purposes of appellate review, but
4 will not be require to keep any of additional information about those ballots and may proceed
5 with tabulating and counting them. The balance of Applicant-Intervenor's lawsuit is dismissed
6 without prejudice. The certification should proceed tomorrow.

7 This litigation is concluded. King County should proceed to count the votes.
8

9 Dated this 16th day of November, 2004.
10

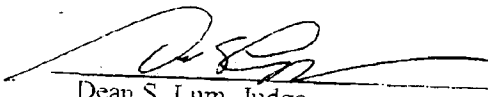
11 
12 Dean S. Lum, Judge
13 King County Superior Court
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Exhibit E

Exhibit E

IN THEIR OWN WORDS



**ON THE DECISION BY WASHINGTON
DEMOCRATS TO DEMAND A SECOND RECOUNT
IN THE GOVERNOR'S RACE**

REPUBLICAN GOVERNOR-ELECT DINO ROSSI:

"This really is sad and desperate. How much do they want to put the voters of Washington through? We were elected and certified twice. I have faith in voters; Christine Gregoire has faith in lawyers."

@DDITIONAL INFORMATION

PRIMARY SOURCES ONLINE:

Republicans: www.wsrp.org

Democrats: www.wa-democrats.org

Returns: www.vote.wa.gov

Secretary of State Sam Reed will today officially order a statewide hand recount of votes cast in the Washington governor's race. After the original count, Republican Dino Rossi had a 261-vote advantage over Democrat Christine Gregoire. That slim margin triggered an automatic machine recount, which Rossi won by 42 votes. Here is how the hand recount the Democrats are asking for will work:

Exhibit F

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN
PARTY, an unincorporated association; and
CHRIS VANCE, an individual,

Plaintiffs,

v.

SAM REED in his official capacity as Secretary
of State for the State of Washington; DEAN
LOGAN, in his official capacity as Director of
King County Division of Records, Elections, and
Licensing Services,

Defendants.

No.

MOTION FOR TEMPORARY
RESTRAINING ORDER AND
MEMORANDUM IN SUPPORT
THEREOF

I. INTRODUCTION

Plaintiffs Washington State Republican Party and Chris Vance move for a temporary restraining order enjoining the Washington Secretary of State and the King County Division of Records, Elections, and Licensing Services from implementing new guidelines for the recount of votes cast in Washington's race for the governor's office. The guidelines and the manner in which they are being applied violate the United States Constitution.

II. FACTS

A. The Parties

Plaintiff Washington State Republican Party ("Republican Party") is an unincorporated association functioning as a political party that endorses, promotes, and acts on behalf of

MOTION AND MEMO FOR TRO

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SEA 1577299v1 51988-1

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1 candidates for offices in Washington. See RCW 29A.04.086. As a result, the Republican Party
2 has an interest in ensuring that ballots handled and counted in accordance with Washington
3 law, and to ensure the integrity of the vote counting process.

4 Plaintiff Chris Vance is a citizen of Washington and a resident of King County. He is a
5 lawful registered voter and a supporter of the Republican Party and of Dino Rossi's candidacy
6 for governor.

7 Defendant Sam Reed is the Secretary of State for the State of Washington responsible
8 for establishing the rules for and administering elections in Washington. Dean Logan is the
9 Director of the King County Division of Records, Elections, and Licensing Services is
10 responsible for administering elections in King County.

11 B. Recount

12 Washington statutes provide for a mandatory manual recount only when the difference
13 in the number of votes cast for the apparent winner and the closest apparently defeated
14 opponent is less than one hundred fifty votes and also less than one-fourth of one percent of the
15 total number of votes cast for both candidates. See RCW 29A.64.021(1)(b). In this election,
16 the difference in the governor's race was greater than 150 votes. Therefore, the standard for a
17 manual recount has not been reached. Instead, the Secretary of State has ordered a statewide
18 machine recount.

19 On November 19, 2004, two days after certification of the general election, the
20 Secretary of State acknowledged that "[t]here are no WACs addressing recounts specifically"
21 and issued new guidelines for the machine recount for the gubernatorial election. See Exhibit
22 A, Secretary of State's Governor Recount Guidelines 2004 ("Recount Guidelines"),
23 <http://www.soundpolitics.com/GovernorRecountGuidelines.doc>.

24 In Washington, most counties used optical scan ballots or punch card ballots in the 2004
25 general election. In general, optical scan involves a voter recording his or her vote by using a
26 pen to darken on a ballot while punchcard ballots involve a voter punching out a hole on or
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1 detaching a chad from the ballot to indicate the candidate for whom the person intended to
2 vote.

3 King County is one of approximately 24 counties that use optical scan ballots. On
4 information and belief, the following counties used punchcard ballots: Asotin, Benton,
5 Clallam, Clark, Franklin, Island, Lewis, Lincoln, Mason, Okanogan, Pacific, Stevens, Thurston,
6 and Whatcom.

7 The recently issued Recount Guidelines contain provisions specifically addressed to
8 optical scan counties:

9 All valid write-in votes for Governor must be individually tallied.
10 **Optical scan counties may need to out-stack overvotes,**
11 **undervotes, and write-ins to find all the valid write-ins to**
12 **tally.** RCW 29A.60.021(3).

13 **In optical scan counties, if the ballot counter cannot out stack**
14 **undervotes for the office of Governor, then a manual check for**
15 **undervotes must be performed.**

16 Recount Guidelines at p.2 Counting the Ballots (emphasis added).

17 The Recount Guidelines do not contain a corresponding provision directing punchcard
18 counties to out-stack overvotes, undervotes, and write-ins , nor do the guidelines contain a
19 corresponding provision directing punchcard counties to conduct any manual check for
20 undervotes.

21 An overvote occurs on a ballot when there are marks on a ballot for more than one
22 candidate for a particular office. An undervote occurs on a ballot when a vote is not recorded
23 for any candidate for a particular office. That is, if there is no vote recorded on a ballot for a
24 gubernatorial candidate – or any other race on the ballot – that ballot constitutes an undervote.

25 Under King County's procedure, undervoted ballots will be removed from the vote
26 tallying machines and manually inspected by King County election officials in an attempt to
27 divine a voter's "intent." As a result, election workers in King County are reviewing undervote
ballots, applying a subjective standard in evaluating any marks on the ballot, and determining
"voter intent." Once such a determination has been made, King County election officials are

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1 recording the ballot number, "enhancing" the *original* ballot, and then re-running the original
2 ballot through the vote tallying machine – thereby making it impossible to reexamine or dispute
3 any enhanced ballots. In contrast to the process in King County, and other optical scan
4 counties, the Recount Guidelines don not direct the manual inspection of punchcard ballots to
5 determine voter intent. Put simply, a voter's vote is more likely to be counted in King County
6 than in other Washington counties. The Recount Guidelines do not, and cannot, offer any
7 justification for treating voters in punchcard counties differently from voters in optical scan
8 counties. There is simply no legitimate justification for this ongoing disparate treatment.

9 III. ARGUMENT

10 A. The Standards For Granting a Temporary Restraining Order or 11 Preliminary Injunction

12 Preliminary injunctive relief is appropriate when the plaintiff demonstrates either (1) a
13 combination of probable success on the merits and the possibility of irreparable harm; or (2)
14 that serious questions are raised and the balance of hardships tips in its favor. *Matthews v.*
15 *NCAA*, 79 F. Supp. 2d 1199, 1203 (E.D. Wash. 1999); *Sun Microsystems v. Microsoft*
16 *Corporation*, 188 F.3d 1115, 1119 (9th Cir. 1999). These standards represent two points on a
17 sliding scale in which the required degree of irreparable harm increases as the probability of
18 success decreases. *Id.*

19 The irreparable harm normally required for injunctive relief exists when, as here,
20 damages are inadequate to compensate the plaintiff or cannot be accurately calculated. *Rent-A-*
21 *Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1999);

22 Plaintiffs have been, and continue to be, irreparably harmed by King County's
23 unconstitutional recount procedure. Because original ballots are being enhanced on the basis of
24 a subjective determination of voter "intent," each "enhancement" is final, and cannot be
25 reviewed or re-examined. Moreover, such ballots would be difficult, if not impossible to
26 locate, as King County is simply mixing them back into the general ballot pool once the
27

1 “enhancement” is complete. In other words, once enhanced, the egg cannot be unscrambled;
2 and as each hour passes, more and more eggs are broken.

3 **B. King County’s Manual Recanvass Constitutes a Violation of the Equal**
4 **Protection Clause of the United States Constitution.**

5 The United States Supreme Court, in *Bush v. Gore*, 531 U.S. 98 (2000), clearly
6 established that differing treatment of votes in a recount by different counties throughout a state
7 constitutes a constitutional violation of the Fourteenth Amendment’s Equal Protection Clause.
8 In particular, the Court noted, “. . . the right to vote as the legislature has prescribed is
9 fundamental; and one source of its fundamental nature lies in the equal weight accorded to each
10 vote and the equal dignity owed to each voter.” *Id.* at 104. . Courts throughout the country
11 have embraced this ruling, and have protected the rights of voters to be treated, and have their
12 votes counted equally. *See e.g., Pierce v. Allegheny County Board of Elections*, 324
13 F.Supp.2d 684, 697 (W.D. Pa. 2003)(“A state must impose uniform statewide standards in
14 each county in order to protect the legality of a citizen's vote. Anything less implicates
15 constitutional problems under the equal protection clause of the Fourteenth Amendment.”).
16 Moreover, the Washington Supreme Court has embraced this view as well, stating: “[t]he equal
17 protection clause requires that all citizens be permitted to participate equally in the election
18 process,” and that “the basic principle of representative government remains, and must remain,
19 unchanged **the weight of a citizen's vote cannot be made to depend on where he lives.**”
20 *Story v. Anderson*, 93 Wn.2d at 549 (1980)(citing *Reynolds v. Sims*, 377 U.S. 533, 565-66
21 (1964))(emphasis added).

22 The very same equal protection violations present in *Bush v. Gore* exist – and are
23 currently ongoing in King County. Defendants have failed to establish, apply, and implement
24 uniform ballot counting procedures. Applying counting standards in selected counties different
25 from those in others assigns greater weight to some Washington voters solely by virtue of
26 where they live. Many such voters injured by these practices are members of the Republican
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1 Party. The application of unconstitutional regulations damages Plaintiffs' interests and violates
2 the constitutions by disenfranchising eligible citizens. Plaintiffs will suffer irreparable injury if
3 Defendants' actions continue.
4

5 DATED this 20th day of November, 2004.

6 Davis Wright Tremaine LLP
7 Attorneys for Plaintiffs Washington State
8 Republican Party and Chris Vance

9
10 By 

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